(10)

No. 84-262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONER

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November 1984

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QUESTIONS PRESENTED

1. Whether under Section 17 of the Pueblo Lands Act of 1924, a New Mexico Indian Pueblo can convey a right-of-way across its land if it obtains the approval of the Secretary of the Interior or whether, on the other hand, it can make no conveyance of any interest in any of its land without the sanction of a further congressional enactment.

2. Whether a trespass action by a New Mexico Indian Pueblo against a good-faith claimant to a right-of-way across the Pueblo's land is barred by res judicata when, in a previous suit brought by the United States on behalf of the Pueblo to quiet title to the Pueblo's lands and enjoin alleged trepasses, the plaintiff United States moved for and secured a court order dismissing the claimant as a defendant on the ground, recited by the court, that the claimant enjoyed a valid title to the right-of-way by agreement with the Pueblo.*

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*All the parties are named in the caption. The petitioner's corporate affiliates are listed at page ii of the petition for certiorari.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the District of New Mexico is not reported. It is reproduced at pages 85-94 of the Joint Appendix. The opinion of the Court of Appeals for the Tenth Circuit, which is reported at 734 F.2d 1402, is reproduced at pages 96-108 of the Joint Appendix.

JURISDICTION

The judgment of the court of appeals, affirming on an interlocutory appeal the district court's partial summary judgment in favor of the respondent (J.A. 108), was entered on May 14, 1984. A petition for a writ of certiorari was filed on August 13, 1984, and the writ was granted on October 9, 1984. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 17 of the Pueblo Lands Act, the Act of June 7, 1924, 43 Stat. 641 (never codified), provides:

> "No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."

The other provisions of the Pueblo Lands Act, 43 Stat. 636, are set forth in an appendix to the petition for certiorari (Pet. App. 25-38).

STATEMENT

Petitioner Mountain States Telephone and Telegraph Company (hereinafter sometimes referred to as Mountain Bell) is the principal provider of local and intrastate telephone service in New Mexico. Substantial parts of the land of New Mexico, lying athwart natural lines of communication, are owned by Indian Pueblos, including the respondent Pueblo of Santa Ana. In order to provide efficient and economical service between

New Mexico communities (and to serve the Pueblos themselves) Mountain Bell's lines must cross some Pueblo lands. Between about 1905 and 1980 a line of telephone poles crossed land owned by the Pueblo of Santa Ana, along what Mountain Bell believed to be a valid right-of-way obtained from the Pueblo.[1]

The validity of the original 1905 right-of-way was cast in doubt by judicial decisions concerning the status of the Pueblo Indians. Thereafter remedial legislation was enacted by Congress in 1924. Upon the payment by Mountain Bell of compensation, the Pueblo of Santa Ana made a new conveyance to Mountain Bell of the right-of-way for its line of telephone poles, with the approval of the Secretary of the Interior as required by the 1924 statute. A quiet title suit brought pursuant to the same remedial statute to remove clouds on the title to the Pueblo's land was dismissed by the district court as against Mountain Bell, on the strength of the same new right-of-way grant.

Now, the Pueblo has brought suit against Mountain Bell repudiating its conveyance of the right-of-way. The Pueblo claims that the remedial statute was misunderstood at the time by itself, by Mountain Bell, and by the Government, and has been misunderstood since; and that, contrary to the parties' 50 years' understanding, the statute did not authorize the grant of the right-of-way. The Pueblo further claims that the court's dismissal of Mountain Bell from the earlier quiet title suit on the ground that the right-of-way grant entitled it to judgment

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[1] The Pueblo of Santa Ana alleged in its amended complaint that its governing body did not grant permission for the original construction of Mountain Bell's telephone line across its land (J.A. 5); Mountain Bell said in its answer that it obtained rights-of-way across the Pueblo's land in 1904 or 1905 and denied for want of information and belief the Pueblo's allegation of lack of permission from its governing body (J.A. 8-9). For reasons indicated below, there has been no adjudication of the issues as they relate to the period between 1905 and 1928.

is not an adjudication to be given preclusive effect. The result of the decision below sustaining this uningratiating claim is that the Pueblo may be entitled to an accounting of profits and to damages (which, to be sure, might be nominal) for the "trespass" of Mountain Bell's lines on its land — a "trespass" that it invited and for which it was paid. The result will also be that innocent, good-faith purchasers from New Mexico Pueblos of rights-of-way for public service facilities such as communications, gas and electric utilities and railroad lines can be ejected unless they pay for their rights-of-way a second or even a third time.

The Status of the Pueblo Indians Before 1924

A corporate predecessor to Mountain Bell acquired a right-of-way in 1904 or 1905 (*see* note 1, *supra*) and constructed a part of the El Paso-Denver telephone trunkline across the tract of land known as El Ranchito owned by the Pueblo of Santa Ana. At that time there was every reason to believe that the Pueblos of New Mexico, unlike other Indian communities and tribes, could freely convey to others rights-of-way and other interests in the lands they owned. New Mexico was then a territory, and in *United States* v. *Joseph*, 94 U.S. 614 (1876), this Court affirmed a judgment of the territorial courts that a section of the Indian Trade and Intercourse Act of 1834 (the "Non-Intercourse Act"), 4 Stat. 729, 730, that made trespassing on Indian lands subject to a federal penalty, was not applicable to the Pueblos even though the statute had been extended in 1851 to Indian Tribes in New Mexico, 9 Stat. 574, 587. The Court described the Pueblo Indians, with their stable fixed communities, as having reached a state of civilization above that of most Indians and concluded that they were therefore not "Indians" subject to the 1851 extension.[2] The *Joseph* opinion con-

[2] Descriptions of the Pueblos and their history under Spanish, Mexican, and United States rule, giving rise to what was thought to be their special status, are contained in the opinion in *Joseph* and later opinions of this Court, discussed just below.

firmed the general understanding resulting from the decisions of the territorial courts that the Pueblos managed their own affairs, including land transactions, without federal supervision or interference.

A provision of the New Mexico Enabling Act of 1910 stated that "the terms 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them." 36 Stat. 557. In *United States* v. *Sandoval*, 231 U.S. 28 (1913), the Court sustained the constitutionality of this provision in holding that the prohibition on introducing liquor into Indian country applied to the New Mexico Pueblos, which the territorial Supreme Court had held six years before were not subject to that ban.[3] This Court also indicated that, even apart from the 1910 Enabling Act, the statements in *Joseph* distinguishing the Pueblo Indians from other Indians in terms of their amenability to federal legislation applicable to Indians generally could no longer be relied on. 231 U.S. at 48-49.

Since the 1834 Non-Intercourse Act applicable to Indians generally prohibited the alienation of Indian land except pursuant to treaty, *Sandoval* called in question all the land titles obtained from the Pueblo Indians during the time when they had been regarded as not subject to federal Indian laws. This Court did not squarely hold the Pueblos subject to the Non-Intercourse Act until 1926 when it decided *United States* v. *Candelaria*, 271 U.S. 432. But "[t]he effect of the *Sandoval* decision was to spread consternation among the people of New Mexico who held lands to which the Pueblos laid claim." F. Cohen, *Handbook of Federal Indian Law* 389 (1942). Congress enacted the Pueblo Lands Act in 1924 to bring order to the confused Pueblo land regime.

[3] United States v. Mares, 14 N.M. 1, 88 P. 1128 (1907).

The Pueblo Lands Act

The Pueblo Lands Act of 1924 (Pet. App. 25-38) established the Pueblo Lands Board, consisting of the Attorney General, the Secretary of the Interior, and a presidential appointee, charged with determining the boundaries of the several Pueblos and initially hearing the cases of non-Indian claimants to Pueblo land. § 2 (Pet. App. 25-26). The Lands Board was to file a report for each Pueblo listing the lands to which its title had not been extinguished by adverse possession or other similar means, and the Attorney General was directed to bring suits to quiet title to all the lands so listed. §§1, 2, 3 (Pet. App. 25-26). The Act specifically provided for recognition, in the Lands Board's determinations and the quiet title suits, of interests acquired against the Pueblos by prescriptive means, on terms derived from New Mexico law governing adverse possession. §§2, 4 (Pet. App. 25-28).

Both the Lands Board determinations and the quiet title suits were addressed to the effect on Pueblo Indian titles of *past* conduct and would determine the *present* status quo. Congress enacted Section 17 of the Pueblo Lands Act (p. 2, *supra*), whose proper construction is in issue here, to govern *future* dispositions of Pueblo lands.

The 1928 Right-of-Way Conveyance

Acting pursuant to Section 17 of the Pueblo Lands Act, the Pueblo of Santa Ana and Mountain Bell executed a right-of-way agreement on February 23, 1928. (J.A. 38-43.) The agreement was signed on behalf of the Pueblo by its governing officials and recited that they had "full power and authority to execute instruments conveying easements and rights of way across the lands owned and controlled by the Pueblo . . . subject, however, to the approval of the Secretary of the Interior." (J.A. 38-39.) The instrument granted to Mountain Bell an "easement to construct, maintain and operate a telephone . . . pole line," along a designated line across that part of the

Pueblo known as El Ranchito. (J.A. 39-40.) The monetary consideration was stated to be $101.60. (J.A. 39.)

The superintendent of the Bureau of Indian Affairs' Southern Pueblos Agency in Albuquerque forwarded the right-of-way agreement to the Commissioner of Indian Affairs in Washington. (J.A. 180-81.) The superintendent had attended the negotiations between the Pueblo officials and the Mountain Bell representatives and, in recommending approval of the agreement by his superiors, said that he believed the price to be paid by Mountain Bell was fair — "a little higher than the price paid by this company to some of the other pueblos" because the Santa Ana Pueblo claimed some land that was in dispute and Mountain Bell gave it the benefit of the doubt. The price amounted to 80 cents a pole for 127 poles. The Commissioner of Indian Affairs in turn wrote to the Secretary of the Interior, endorsing the superintendent's description of the transaction as fair and recommending that it be approved by the Secretary pursuant to Section 17 of the Pueblo Lands Act. (J.A. 182-83.) Assistant Secretary Edwards, acting upon the BIA recommendation, approved the agreement pursuant to Section 17 on April 13, 1928. (J.A. 43.)

Other Conveyances Pursuant to Section 17

The Santa Ana-Mountain Bell agreement was only one of a large number of right-of-way conveyances by New Mexico Pueblos that the Secretary of the Interior or an assistant secretary approved pursuant to Section 17 beginning soon after the enactment of the Pueblo Lands Act. Fifty-nine other conveyances of rights-of-way and one other conveyance of a different sort are found in records of the Southern Pueblos Agency, which does not account for all the Pueblos. (J.A. 112-14, 188.) The first of these was approved in April 1926 and the last in December 1959. (J.A. 113-14, 188.) These rights-of-way covered "[r]oads, pipelines, power lines, ditches and canals, railroads, telephone and telegraph." (J.A. 114.) The

Pueblo of Santa Ana granted nine such rights-of-way, with high-level Department of the Interior approval, between April 1926 and March 1958. (J.A. 114-15, 128-87.)

The Dismissal of Mountain Bell from the Santa Ana Quiet Title Suit

In 1927, in accordance with Sections 1 and 3 of the Pueblo Lands Act, the United States filed suit in equity in the District Court for the District of New Mexico, on behalf of the Pueblo of Santa Ana, to quiet title to certain lands of the Pueblo including those crossed by Mountain Bell's right-of-way, naming Mountain Bell among others as a defendant. (J.A. 16-33.) Mountain Bell was served with process. (J.A. 71.) The United States asserted on behalf of the Pueblo that Mountain Bell and other defendants were trespassers and claimed interests in portions of Pueblo lands that constituted a cloud on the Pueblo's title. (J.A. 25-31.) The complaint requested the court to quiet title to the Pueblo's land and to enjoin the alleged trespasses. (J.A. 31-33.)

The 1928 right-of-way agreement was executed by the Pueblo and Mountain Bell and approved by Assistant Secretary Edwards while the quiet title suit was pending. The special assistant to the Attorney General who was handling the suit for the United States was apprised of the right-of-way agreement and undertook not to take a default judgment against Mountain Bell if its title were perfected by Interior Department approval of the right-of-way agreement. (J.A. 64-65.) On May 23, 1928, Mountain Bell informed the government attorney that the agreement had been approved in Washington and sent him copies of the approved agreement, expressing the understanding that the suit would be dismissed as against Mountain Bell. The company offered to sign a written stipulation if one was desired. (J.A. 66-67.) The United States promptly moved to dismiss Mountain Bell on the ground that it

now had good title to its right-of-way, ending any controversy between it and the Pueblo. (J.A. 36.)

The district court granted the motion and dismissed Mountain Bell as a defendant by an order dated May 31, 1928. The court recited that it appeared

> "that since the institution of this suit [Mountain Bell] has secured good and sufficient title to the right of way and premises in controversy herein between plaintiff and said defendant by deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with the provisions of Section 17 of the Pueblo Lands Act of June 7, 1924 . . . ." (J.A. 37.)

The Present Action

The Pueblo's current suit was brought in the District Court for the District of New Mexico in 1980, 52 years after the second, federally-approved, conveyance to Mountain Bell of its right-of-way and the dismissal of Mountain Bell from the quiet title suit. During that half century and more, the Pueblo gave no hint of dissatisfaction with the presence of Mountain Bell's poles on its land. It did not ask that they be removed or otherwise complain about them. (J.A. 52-53.) Indeed, by the time the suit was brought, the poles had been removed and Mountain Bell had professed its willingness to give up its right-of-way. (J.A. 54, 122-24.)

In its amended complaint the Pueblo, founding jurisdiction on 28 U.S.C. § 1362, alleged a trespass dating from 1905. It asked for an accounting of rents and profits for the period of allegedly unauthorized use of its land and for damages, both actual and punitive. It also asked, nominally, for an injunction against future use, in the absence of a continuing accounting, even though Mountain Bell's telephone poles had been removed. (J.A. 3-7.)

Mountain Bell filed a motion for partial summary judgment, seeking a ruling that, beginning at least with the second right-

of-way conveyance in 1928, it was on the Pueblo's land pursuant to a valid right-of-way and therefore was no trespasser. (J.A. 46-48.) In support of the motion Mountain Bell showed the 1928 conveyance, the history of administrative construction of Section 17, and the dismissal as to it of the Santa Ana Pueblo quiet title suit.

The district court denied Mountain Bell's motion and granted partial summary judgment to the Pueblo (covering the period since 1928) even though the Pueblo had not moved for summary judgment and Mountain Bell had stated affirmative defenses—laches and estoppel, among others—that were not in issue on its motion for summary judgment (J.A. 9-14). The court directed that the "Pueblo shall recover damages from April 18, 1928 to the date [Mountain Bell's] telephone and telegraph line was removed." (J.A. 94.) The Pueblo's prayer for $500,000 in punitive damages was expressly denied. (*Id.*)

The district court ruled that Mountain Bell did not have a valid right-of-way and was therefore a trespasser on the theory that the Secretary of the Interior's approval of the right-of-way agreement was not enough to satisfy Section 17 of the Pueblo Lands Act. It further held that the 1928 dismissal of the quiet title suit against Mountain Bell on the Government's motion, reciting as the reason the newly-conveyed right-of-way, did not have res judicata effect. (J.A. 85-94.)

Mountain Bell asked for and obtained leave from the district court and the court of appeals to take an interlocutory appeal on the controlling issues of law, pursuant to 28 U.S.C. § 1292(b). (J.A. 94-96.) On the interlocutory appeal, the court of appeals affirmed, agreeing with the district court that under Section 17 of the Pueblo Lands Act no conveyance of any interest in land could be made by a Pueblo, even with the approval of the Secretary of the Interior, until Congress took further action. The court did not dispute Mountain Bell's showing that the Secretary had consistently construed the statute otherwise from the outset, but it rejected that administrative

construction as violative of the "plain congressional intent." The court of appeals also agreed with the district court that the order of dismissal of the quiet title suit did not have res judicata effect because the court thought that the order was without prejudice as a matter of law and therefore not a final judgment. (J.A. 96-108.)

SUMMARY OF ARGUMENT

Mountain Bell was entitled to summary judgment on its defense to the Pueblo's claim of trespass for the period between 1928 and 1980 on two separate grounds. First, during that period Mountain Bell's poles were on the Pueblo's land pursuant to a right-of-way freely conveyed by the Pueblo with the federal approval required by the applicable federal law. Second, Mountain Bell was dismissed by court decree in 1928 from a quiet title suit brought on behalf of the Pueblo, on the ground that Mountain Bell had a valid interest in the Pueblo's land, and the decree of dismissal operates to bar the Pueblo's trespass action regardless of whether the right-of-way in fact was valid.

I.

Section 17 of the Pueblo Lands Act, which in terms prohibits conveyances of Pueblo lands unless approved by the Secretary of the Interior, is most reasonably understood as authorizing such conveyances when the required Secretarial approval is obtained. This reading is the only one that satisfactorily harmonizes and gives effect to the two separate clauses of Section 17; it is, moreover, consistent with the legislative history and historical context of the Act and with the policy of the Indian laws generally. But even if it were not clearly the best interpretation, it is a reasonable interpretation that was adopted by the Secretary shortly after the Act was passed and has been consistently followed ever since. The court below erred in declining to defer to this reasonable contemporaneous con-

struction of the statute by the agency charged with administering it.

A. The court of appeals' interpretation of the first clause of Section 17 as prohibiting all conveyances of Pueblo land without further congressional action is unsatisfactory in numerous respects. Among other difficulties, it makes the second clause either inconsistent with the first or else a superfluous provision with no substantive effect. The better reading interprets the first clause as prohibiting only involuntary transfers of Pueblo land by acquisitions or initiations of adverse interests of the kind addressed, as to past transactions, elsewhere in the Act. This interpretation of the first clause makes it possible to give effect to the apparent intent of the second clause to permit continued consensual conveyances if approved by the Secretary of the Interior.

B.-C. This reading is also supported by the legislative history of the Act and by its historical and legal context. For many decades, the New Mexico Indian Pueblos had been believed not subject to the Indian laws generally and had freely conveyed their lands without governmental approval. Confusion about the extent of their rights to convey arose because of a change in judicial understanding as to the reach of the Indian laws. An interpretation of Section 17 as permitting conveyances by the Pueblo Indians with the Secretary's approval applies the general policy of the Indian laws to the Pueblos with due recognition of their historic freedom to convey. Conversely, interpreting Section 17 to prohibit all conveyances of Pueblo lands would subject the Pueblos to a disability that there is no indication whatever that Congress intended to impose.

D. Under well-settled principles reaffirmed only recently by this Court, the Secretary's consistent 50-year construction of Section 17 as authorizing Pueblo land conveyances with his approval must be accepted by a reviewing court unless it is clearly wrong. Even if there were greater doubt than there is about the correctness of the Secretary's reading, it cannot

possibly be considered clearly wrong. The Secretary's interpretation is at least reasonable, and the court was therefore not free to substitute its own judgment, especially where to do so unsettles 50 years of land titles.

II.

The Pueblo's claim of title to the right-of-way that the court below has now upheld was submitted to a federal court in New Mexico by the United States, suing on behalf of the Pueblo, in an equity suit brought under the Pueblo Lands Act in 1927. That suit was dismissed as to Mountain Bell and its right-of-way on the motion of the United States in 1928 after the basis for the Pueblo's claim ostensibly had been removed by the 1928 right-of-way agreement between the Pueblo and Mountain Bell. The Court's order of dismissal recites that the right-of-way agreement gave Mountain Bell "good and sufficient title." Under principles of res judicata, the 1928 decree is a bar to the Pueblo's attempt to sue again on the same claim against Mountain Bell over 50 years later.

A. The court below erred in holding that the decree of dismissal was without prejudice, and therefore not final, based on the presumption of Fed. R. Civ. P. 41(a). In 1928, before Rule 41(a) was adopted, the opposite presumption was followed in federal equity courts, and an equity dismissal was presumed to be with prejudice unless otherwise expressly indicated. Moreover, the 1928 decree was expressly based on the plaintiff's recital that the merits of the claim had been resolved, and it was therefore a binding renunciation of the plaintiff's claim.

B. Application of res judicata based on the 1928 decree is also required by the intent of Congress in the Pueblo Lands Act, under which the suit was brought, and by the strong policies favoring finality of judgments in quiet title actions. The Pueblo Lands Act contemplated a single comprehensive final resolution of the unsettled claims to Pueblo lands that were to be the subject of quiet title suits authorized by the Act. Like-

wise, the policies of certainty and repose served by the doctrine of res judicata are, as this Court reaffirmed last year, "at their zenith" in real property cases. *Nevada* v. *United States*, 103 S.Ct. 2906, 2918 n.10 (1983). And it is manifestly unfair to require Mountain Bell to face a threat of trespass damages on a stale challenge to its title, believed to have been long since resolved, after it has for over 50 years, in reliance on the 1928 decree, forgone alternative methods of securing its right-of-way.

ARGUMENT

The decision below sanctions a repudiation by the Pueblo of Santa Ana of a right-of-way it granted in a 1928 agreement and honored without question for over 50 years. The court holds Mountain Bell liable for trespass damages on account of its 50 years of good faith unchallenged use of the right-of-way in reliance on the 1928 agreement. To reach this unfortunate result, the court both overturns a half century of consistent and reasonable administrative interpretation of the Pueblo Lands Act by the agency charged with its enforcement—an interpretation in which the Pueblo until lately concurred—and permits the Pueblo to assert this untimely claim notwithstanding the judicial dismissal, based on the 1928 agreement, of its prior quiet title and trespass suit against Mountain Bell presenting the same claim to the same right-of-way. The decision thereby undermines numerous New Mexico land titles derived from Pueblo Indian conveyances and contravenes the principles of certainty and predictability that are essential where title to real property is concerned.[4]

[4] In December 1982, 16 lawsuits were filed by New Mexico Pueblos against holders of rights-of-way across Pueblo lands asking for repudiation of the rights-of-way. They are listed in an appendix to the petition for certiorari. (Pet. App. 40-42.)

In Part I below we demonstrate that the applicable statute, Section 17 of the Pueblo Lands Act, was satisfied when the Assistant Secretary of the Interior gave his approval to the right-of-way conveyance that the officials of the Santa Ana Pueblo voluntarily executed. For that conveyance the Pueblo received compensation from Mountain Bell that the federal official on the scene, well-versed in comparable transactions, thought more than fair. That the right-of-way could be granted with Interior's approval follows from the language of Section 17, from its history, from its context in the Pueblo Lands Act and the larger body of Indian law, and from the unique position of the Pueblos. Furthermore, Section 17 has been construed from the beginning to authorize such conveyances by the agency charged with administering it, and plainly the Interior Department's construction is " 'sufficiently reasonable' to be accepted by a reviewing court" even if it were not the construction a court might have adopted had it been presented with the issue in the first instance. *Federal Election Comm'n* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981).

In Part II we show that the decree dismissing Mountain Bell as a defendant to the Santa Ana Pueblo quiet title suit in 1928 raises the bar of res judicata to this trespass action between the same parties, relating to the same land and the same line of telephone poles.

I. THE PUEBLO OF SANTA ANA CONVEYED TO MOUNTAIN BELL A RIGHT-OF-WAY FOR ITS TELEPHONE LINE ACROSS PUEBLO LAND, WHICH WAS MADE EFFECTIVE BY THE APPROVAL OF THE SECRETARY OF THE INTERIOR UNDER SECTION 17 OF THE PUEBLO LANDS ACT OF 1924; NO ADDITIONAL GOVERNMENTAL APPROVAL WAS REQUIRED.

The words, the history, and the context of Section 17 of the Pueblo Lands Act lead inexorably to the conclusion that a New

Mexico Indian Pueblo can convey an interest in its land if the Secretary of the Interior or his high-level delegate approves. Even if there were larger doubt on that score than there is, this Court would be bound to accept the consistent administrative construction of the statute as authorizing such conveyances, a construction that if not compelled by the terms of the statute at least is reasonably to be derived from its terms.

A. By Its Terms, Fairly Read, Section 17 Permits Consensual Transfers of New Mexico Indian Pueblo Lands if the Approval of the Secretary of the Interior Is Had.

There is no mistaking the meaning of the second clause of Section 17 of the Pueblo Lands Act. Standing by itself, it says:

> "[N]o sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."

The logical, indeed inescapable, implication is that a conveyance of land, or of some interest in land, by a New Mexico Indian Pueblo is valid in law and in equity if approved by the Secretary of the Interior. Although the court below did conclude that Section 17 is not an authorization to "the pueblos to grant their lands" (J.A. 103), that was not because of the negative terms in which the second clause is expressed but because of the court's mistaken view that the first clause of Section 17 also applies to consensual land transfers.

The first clause reads:

> "No right, title or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, . . ."

There is a comma after the final word "Congress" in the first clause, and the two clauses are joined by "and." The first clause introduces an ambiguity, a "puzzle," as a lawyer intimately concerned with the meaning of the statute wrote early in 1926,[5] giving rise to a need to construe the otherwise unambiguous second clause. Clearly the court of appeals is wrong in believing that, given the joinder of the two clauses by "and," there is no ambiguity in the section as a whole, and in saying that the statute

> "means exactly what it says. No alienation of the Pueblo lands shall be made 'except as may hereafter be provided by Congress' *and* no such conveyance 'shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.'" (J.A. 103.) (Emphasis in original.)

Quite the contrary. As the Justice Department lawyer assigned to the Pueblos wrote, "At first reading the two halves of the section seem contradictory," one saying that title to Pueblo lands cannot be acquired except under subsequent legislation and the other that Pueblo lands may be conveyed at any time with the Secretary of the Interior's approval.[6] Clearly the two clauses require harmonization.

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[5] A letter of February 27, 1926, to the Attorney General from George A.H. Fraser, Esq., a special assistant to the Attorney General working with the Pueblos in New Mexico, was proffered to the Court by the Pueblo as an appendix to its brief in opposition. The letter is a useful piece of evidence of the early construction of the statute, and for convenience we have reproduced it as an appendix to this Brief (pp. 1a–5a, *infra*). It contains Mr. Fraser's statement, partially quoted in the text, that § 17 "presents one of the numerous puzzles offered" by the Pueblo Lands Act (p. 3a, *infra*).

[6] Fraser letter, n.5 *supra* (p. 3a, *infra*).

The Tenth Circuit's "means-what-it-says" view ignores any number of questions pertinent to harmonizing the two clauses:

Why, if both clauses are meant to apply to the same class of transactions, are they phrased so differently?

Why is only the second clause phrased in the traditional terms of grants and conveyances?

Why, indeed, if the two clauses impose conditions on the same class of transactions, did the legislative draftsman use two clauses instead of simply adding at the end of the first clause the phrase "and approved by the Secretary of the Interior"?

Why the pointed reference in the first clause, but not in the second, to acquiring title "by virtue of the laws of the State of New Mexico"?

Why, in the first clause, in contrast to the traditional conveyancing terms of the second, are the word "acquired" and the most unusual word "initiated" used to signify the restricted means of obtaining rights or title to or interests in Pueblo lands?

Why the meaningless gesture of saying that approval of the Secretary of the Interior was required if no conveyance would be effective in the absence of action by a subsequent Congress, which would not be bound by the 68th Congress' requirement of approval of conveyances by the Secretary?

The key to answering all these questions, which the court below did not ask, is that the two clauses do not apply to the same class of transactions. That they do not appears from the face of the statute.

The first clause deals specifically with the problem of claims against the Pueblos based on adverse possession under New Mexico law and with other means, such as condemnation, of divesting the Pueblos of their land without their consent. Claims to Pueblo land existing in 1924 by reason of past adverse

possession, under claim of right or otherwise, were to be recognized in the quiet title suits, as specifically allowed by Section 4 of the Act (Pet. App. 27-28). But that was an unusual act of grace, contrary to the usual rule that adverse possession is not good against the United States.[7] Against that background, the first clause of Section 17 is understood as intended to preclude the growth of a new set of adverse claims — at least without Congress first having the chance to consider the matter. That is the only possible explanation for references in the first clause to "acquiring" or "initiating" land rights under the laws of New Mexico. The term "acquired" is appropriately used to indicate the acquisition of title by adverse possession or other nonconsensual means. *See, e.g.*, R. Powell & P. Ronan, *Powell on Real Property* ¶ 1012 [2], at 91 (1984 ed.). And the term "initiated" denotes a special way of beginning the process of acquiring title by possession — by filing and recording an affidavit with a New Mexico county official.[8] Only the phrase

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[7] See *Hearings on S. 3865 and S. 4223 Before a Subcomm. of the Senate Comm. on Public Lands and Surveys*, 67th Cong., 4th Sess. 49-50, 60-62, 75 (1923) (hereinafter "1923 Senate Hearings"); *Hearings on H.R. 10452 and H.R. 10674 Before the House Comm. on Indian Affairs*, 67th Cong., 4th Sess. 145-46 (1923) (hereinafter "1923 House Hearings").

[8] There was extensive testimony in the 1923 hearings regarding nonconsensual means of gaining title under New Mexico law. Witnesses testified, among other things, that under the laws of New Mexico, prior to 1889, one could "initiate" title in himself to a piece of property by filing and recording an affidavit with the appropriate county recorder. 1923 Senate Hearings 94; *see id.* at 80; 1923 House Hearings 59; N.M. Comp. L. 1897, § 3937 (statute of limitations begins to run in favor of one possessing property from the date of recording of affidavit).

Having initiated the title process by filing and recording under § 3937, one could acquire title by virtue of the New Mexico adverse possession statutes by possessing the land for 10 years, *see* N.M. Stat. Ann. § 3365 (1915); 1923 Senate Hearings 95-96, 224-25; 1923 House Hearings 55-61, 68, 89. New Mexico also recognized acquisition of title through 10 years' adverse possession of lands granted by the governments of Spain, Mexico, or the United States. N.M. Stat. Ann. § 3364 (1915); 1923 Senate Hearings 184-85; 1923 House Hearings 55-56.

"or in any other manner," after the reference to the laws of New Mexico, gives the slightest pause, and that phrase is fairly understood, according to conventional ejusdem generis rules, as encompassing other possible sources of authority for acquisitions of Pueblo land without Pueblo consent, such as federal condemnation law or laws allowing the Secretary of the Interior unilaterally to alienate Indian land interests (pp. 36–38, *infra*). The first clause is simply not written in such a way as to reach consensual conveyances.

On the other hand, the second clause deals naturally and comprehensibly with consensual conveyances. It uses the language of consensual conveyances—sale, grant, lease, conveyance. There is nothing in the joinder of the two clauses by the conjunction "and" that has the effect of making both of the clauses apply to the same class of transactions, as the court of appeals' opinion seems to suggest (J.A. 103). "And" serves just as well to join two clauses that, though broadly related, are independent and apply to different circumstances.

Although a court would be justified in straining to avoid the self-defeating construction of Section 17 that the Tenth Circuit adopted, no straining is necessary. The more rational construction flows comfortably from the statutory words. That conclusion was reached shortly after Section 17 was enacted by a dispassionate observer who lacked a brief-writer's spur of advocacy. George A.H. Fraser, Esq., the special assistant Attorney General who worked with the Pueblos in New Mexico for some years, after noting the first-blush inconsistency of the two clauses of Section 17 (p. 17 & n.5, *supra*), said:

> "We concluded, however, that the two halves might be harmonized by construing the first to mean that no title could be adversely acquired except under subsequent acts of Congress, and the second to mean that the Pueblos might voluntarily convey, and that such conveyance would be good if approved by the Secretary." (Pp. 3a–4a, *infra*.)

He cautiously added that he did not think the construction "certain" but said that it "seems reasonable." (*Id.*) It is at least reasonable, on the statutory words alone. And, if some of the traditional aids to construction are considered, the proper interpretation of Section 17 becomes clear.

B. The History of the Pueblo Lands Act and the Context It Provides for Section 17 Confirm that Section 17 Permits Consensual Transfers of Pueblo Land with the Approval of the Secretary of the Interior.

The events that led to the crisis affecting the lands of the New Mexico Pueblos and thus to the enactment of the Pueblo Lands Act and Section 17 have been briefly recited in the Statement. Under Spanish and Mexican rule, Pueblo Indians had full title to their lands but were regarded as under a state of tutelage and could alienate their lands only under governmental supervision. *United States* v. *Candelaria*, 271 U.S. 432, 442 (1926). The original status of the Pueblos after the cession of New Mexico to the United States in 1848 is not clear. Felix Cohen wrote in his authoritative handbook that "[f]or many years after the accession of New Mexico the Pueblos were not considered Indian tribes within the meaning of existing statutes." F. Cohen, *Handbook of Federal Indian Law* 387 (1942). The tutelage of the United States as successor to Spain and Mexico was sometimes proffered, but the proffer was declined for the Pueblos by the Supreme Court of the Territory of New Mexico,[9] whose views were seemingly confirmed by this Court in *United States* v. *Joseph*, 94 U.S. 614 (1876). The Court held in *Joseph* that, because of the Pueblos' "peaceable, industrious" character, and because their residents lived in "fixed communities, each having its own municipal or local government," the Pueblos were not within the class of Indians with whom a trust relationship with the United States existed under the 1834

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[9] *E.g.*, United States v. Santistevan, 1 N.M. 583 (1874); United States v. Lucero, 1 N.M. 422 (1869).

Non-Intercourse Act, as extended to the Indians of New Mexico in 1851, 9 Stat. 587. 94 U.S. at 619.

Though the Court would later ascribe what was said about the Pueblos in *Joseph* to inaccurate information,[10] the *Joseph* decision effectively settled what all concerned took to be the governing law for nearly four decades. Under that law the Pueblos through their governors were free to transfer Pueblo land to others. With statehood for New Mexico, the express terms of the New Mexico Enabling Act, 36 Stat. 557, and this Court's repudiation of *Joseph* in *United States* v. *Sandoval*, 231 U.S. 28, 48-49 (1913), all that changed. (P. 5, *supra*.) Land titles obtained from the Pueblos were cast in doubt. Congress learned in the 1920's that there were 3,000 non-Pueblo claimants representing 12,000 family members within Pueblo grants, most of whom "had bought and possessed their lands in good faith" in reliance on the earlier court decisions. F. Cohen, *Handbook of Federal Indian Law* 389 (1942).

Congress was bound to act. It finally did so in 1924, when it enacted the Pueblo Lands Act.

Consideration of legislation to end the confusion over Pueblo land titles began in 1921.[11] The confusion, spawned immediately by *Sandoval's* disapproval of *Joseph* after nearly 40 years in which *Joseph* had been understood to state the law, had deeper roots in the anomalous legal position of the Pueblos, which was subject to varying degrees of uncertainty under the successively applicable laws of Spain, Mexico, and the United

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[10] United States v. Sandoval, 231 U.S. 28, 48 (1913).

[11] On June 1, 1921, Senator Bursum of New Mexico introduced S. 1938, 61 Cong. Rec. 1939 (1921), and on July 19, 1921, he introduced S. 2274, 61 Cong. Rec. 4031 (1921). At the request of Secretary of the Interior Fall, these bills were not acted upon. 1923 Senate Hearings 7, 31-32, 254.

States.[12] The early legislation introduced by a Senator from New Mexico foundered on opposition assertions that it was too heavily weighted in favor of the non-Indian land claimants.[13] Other measures failed to win approval in 1923.[14] It was not until 1924 that a consensus emerged and the Pueblo Lands Act was enacted.[15] See F. Cohen, *Handbook of Federal Indian Law* 389-90 (1942).

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[12] Under Spanish rule, the Pueblos were clearly able to convey land only with consent of the government. See United States v. Candelaria, 271 U.S. 432, 442 (1926), citing Chouteau v. Molony, 16 How. 203, 237 (1853). Whether they were similarly restricted under Mexican law is a matter of dispute. *Candelaria*, 271 U.S. at 442, citing United States v. Pico, 5 Wall. 536, 540 (1867), for the affirmative of the proposition; 1923 Senate Hearings 33. The United States guaranteed protection of the rights of Indians as they existed under Mexican law in the Treaty of Guadalupe Hidalgo.

[13] Senator Bursum's S. 1938 provided that non-Indians could obtain title to lands within the exterior boundaries of Pueblo land grants through 10 years of actual, continuous, and adverse possession of lands not to exceed 160 acres in area. Such possession need not be under color of title. Secretary Fall's stated ground of opposition to this bill was that "it was the purpose of this Department to attempt to seek justice for all parties; that 'the passage of the Act in question would simply forestall a settlement based upon a full and comprehensive report of actual conditions; the legal status; the equitable rights and claims of both the Indians and others claiming rights, etc.'" 1923 Senate Hearings 31-32.

[14] In the second session of the 67th Congress, four Pueblo lands bills were introduced. In the Senate, Senator Bursum introduced S. 3855 and Senator Jones of New Mexico introduced S. 4223. In the House, Representative Snyder introduced a slightly revised version of the Bursum bill, H.R. 10452, and Representative Leatherwood introduced H.R. 10674. These bills were the subjects of extensive hearings. 1923 Senate Hearings and 1923 House Hearings. All of the bills were extensively criticized in the hearings.

[15] The Pueblo Land Act of 1924 that was passed and signed on June 7, 1924, was introduced in the 68th Congress as S. 2932, S. Rep. No. 492, 68th Cong., 1st Sess. 2-3 (1924); 65 Cong. Rec. 8445, 8448 (1924). It is in this bill that § 17 first appears. The bill was the result of a subcommittee's efforts to effect a compromise between the various differences of opinion. S. Rep. No. 492 at 6. There are no formal hearings or reports detailing the subcommittee's work.

Without special legislation, any lawsuit that might be brought to quiet titles to the Pueblo lands would be unsatisfactory because, in any such lawsuit, the settler-defendants could not assert against the United States, as guardian for a Pueblo, claims based on state statutes of limitation, adverse possession, or laches. 1923 Senate Hearings 49-50, 60-62, 75, 237-38; 1923 House Hearings 19, 145-46, 310. Thus, a critical provision of the statute was Section 4, which enabled the settlers in defending the quiet title suits authorized by the Act to make claims based on principles derived from New Mexico law governing the acquisition of rights to land by possession. *See generally* 1923 Senate Hearings 224-25.

Section 17 did not become a part of the statute until very late in its consideration.[16] It is not a subject of the reported hearings or the committee reports. But the rationales for its two separate clauses appear clearly in the hearing testimony, which delved deeply into the status of the Pueblos and their lands.

So far as the first clause is concerned, the legislative record testifies abundantly to the difficulty Congress was having in establishing the machinery for resolving the conflicting claims based on the Indians' title, on the one side, and assertions of right coupled with long-term possession, resting on the laws of New Mexico, on the other.[17] The last thing the Congress that enacted the Pueblo Lands Act would have wanted was that the same confusion should recur. That was reason enough for the mandate of the first clause of Section 17 that no new rights in lands confirmed to the Pueblos as a result of the procedures prescribed elsewhere in the Act could be "acquired or initiated by virtue" of New Mexico law "or in any other manner" unless Congress itself so provided. It was unspoken but implicit in the statute as illuminated by its history that one would be ill-

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[16] See note 15, *supra*.

[17] *See, e.g.*, 1923 Senate Hearings 49-52, 57-66, 79-81, 93-96, 104-05, 147-50, 221-26, 236-39; 1923 House Hearings 18-19, 25-27, 55-60.

advised to hold his breath waiting for the further congressional action that it would take to recognize new adverse acquisitions or initiations under New Mexico law.

As for the second clause, it would also help prevent future problems of the kind Congress was then wrestling with by giving fair warning that Pueblo land conveyances without the approval of the Secretary of the Interior were not valid. There is no indication, however, of any intent to prohibit consensual conveyances altogether. The members of the cognizant congressional committees were fully informed at the hearings of the status that the Pueblos enjoyed. The legislators were told that, until *Sandoval* was decided, everyone understood that the Pueblos could alienate their lands without governmental approval,[18] and that it was uncertain even after *Sandoval* what government approval was necessary in the case of Pueblo land transactions.[19] Legislators who were prominent in the enactment of Section 17 seemed to understand from the hearings that a provision for alienation with the approval of the Secretary of the Interior would be permissible and desirable and would in fact maintain the status quo.[20] No one suggested that

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[18] S. Rep. No. 492, n. 15 *supra*, at 5; 1923 Senate Hearings 50-51, 54, 57, 62, 71, 209; 1923 House Hearings 17, 26, 40. Similarly, the legislators heard that, despite the communal nature of Pueblo life, Pueblo Indians could own land in severalty and, within narrow family limits, alienate it with the consent of the Pueblo. 1923 Senate Hearings 229–30, 247; 1923 House Hearings 322. The second clause of § 17 includes a provision for a conveyance of his land by "any Pueblo Indian living in a community of Pueblo Indians" with the approval of the Secretary of the Interior, presumably to ensure that, whatever the individual Indians could do consistent with Pueblo law and custom before *Sandoval*, they could continue to do if they obtained the Secretary's approval.

[19] 1923 Senate Hearings 72-73, 154-55; 1923 House Hearings 40-41.

[20] 1923 Senate Hearings 72-73, 154-55; 1923 House Hearings 41. The House Committee report quoted by the court below (J.A. 103) indicates only a belief on the part of the committee that some federal approval was necessary to make the Pueblos "competent" to convey lands, as they had been assumed to be—without federal approval—before the *Sandoval* decision. H.R. Rep. No. 787, 68th Cong., 1st Sess. 2 (1924).

since *Sandoval* the Pueblos had become so constrained in dealing with their land, which theretofore had been solely theirs to deal with, that they now required explicit congressional sanction for all their conveyances—much less that in the future they *should be* subject to such an awkward and cumbersome requirement as a matter of deliberate congressional policy.

Thus, the legislative history confirms the dichotomy between the two clauses of Section 17.

C. Section 17, Construed as Requiring Approval by the Secretary of the Interior of Conveyances of Interests in Land by the Pueblos, Fits Squarely in the Tradition of Federal Indian Law.

The court of appeals opened its analysis of the meaning of Section 17 with the statement that it seemed clear "that if § 17 is not a delegation of power, the 1928 agreement [between the Pueblo and Mountain Bell conveying the right-of-way at issue] is void." (J.A. 103.) If the court means to say that Congress must delegate to the Pueblos power to alienate their land, the statement reflects an utterly mistaken view of federal Indian law.

Felix Cohen spoke with deliberate emphasis (the more emphatic for his rare use of italics) when he wrote in his handbook:

> "Perhaps the most basic principle of all Indian law . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*" F. Cohen, *Handbook of Federal Indian Law* 122 (1942).

The foundation case for the proposition stated by Cohen is the opinion of the Great Chief Justice in *Mitchel* v. *United States*, 9

Pet. 711, 736-60 (1835). The proposition is stated or reflected in numerous other decisions of this Court.[21]

The question under Section 17, thus, is not whether some power of alienation has been granted to the Pueblos but the extent of the restriction on an existing power that Congress has effected. That is particularly so because Section 17 deals with Indian communities long believed, under *Joseph*, not to be subject to any restrictions on their sovereign power to alienate lands they held in fee simple.

The basic restriction on Indian power to alienate land is found in the Non-Intercourse Act of 1834, now codified as 25 U.S.C. § 177, the successor to a line of temporary and permanent non-intercourse acts, the first of which was enacted in 1790.[22] In its present codified form, the Non-Intercourse Act reads:

> "No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177.

The court below indicated that, in enacting Section 17, Congress meant to apply the Non-Intercourse Act to the Pueblos. (J.A. 100-02.) It is more accurate to say that Section 17 was meant to apply to the Pueblos the policy expressed in the Non-Intercourse Act of requiring some sort of federal approval for

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[21] *See* United States v. Wheeler, 435 U.S. 313, 322-23 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 198 (1978); McClanahan v. Arizona State Tax Comm'r, 411 U.S. 164, 172-73 (1973); Talton v. Mayes, 163 U.S. 376, 384 (1896); Worcester v. Georgia, 6 Pet. 515, 559 (1832).

[22] Act of July 22, 1790, 1 Stat. 137. Four other non-intercourse acts preceded the 1834 Act: Act of March 1, 1793, 1 Stat. 329; Act of May 19, 1796, 1 Stat. 469; Act of March 3, 1799, 1 Stat. 743; Act of March 30, 1802, 2 Stat. 139.

Indian transfers of land. By 1924, the Non-Intercourse Act was, and for some decades it had been, an anachronism in its literal terms. Since 1871 it has been impossible to satisfy literally the Non-Intercourse Act's explicit condition on the validity of Indian conveyances—that they be made by treaty; in that year Congress renounced the making of treaties as a way of dealing with the Indians, 16 Stat. 566, 25 U.S.C. § 71, and no treaties have been made with Indians since then.

The respondent Pueblo of Santa Ana in its brief in opposition to the petition for certiorari attributes what we know as Section 17 of the Pueblo Lands Act to a lawyer for the Pueblos, Francis Wilson, Esq. In December 1923 Wilson wrote to the Commissioner of Indian Affairs referring to Section 17 of "the [unspecified] Bill" (which may or may not be the Section 17 ultimately enacted). He said that this Section 17 was "intended to cover the same ground as" the Non-Intercourse Act (referring to that act by its Revised Statutes section number) "but it is changed so as to accord with the conditions of the Pueblo Indians." (Br. in Opp. App. 12.)

If Mr. Wilson was indeed referring to the Section 17 that was to be enacted as part of the Pueblo Lands Act in 1924, then a comparison of Section 17 with the Non-Intercourse Act shows that the "ground" of the Non-Intercourse Act is covered by the second clause of Section 17 and not the first. It is the second clause that in its form, structure, and language traces the Non-Intercourse Act—changed to accord with the conditions of the Pueblos by requiring the approval of the Secretary of the Interior for voluntary conveyances of land and by not imposing a condition on such conveyances that could not literally be satisfied. Consider:

"No *purchase*, grant, lease or other conveyance of lands, or of any title or claim thereto, *from any Indian nation or tribe of Indians*, shall be of any validity in law or equity, unless the same be *made by treaty or convention entered into pursuant to the Constitution. . . .*" Non-Intercourse Act, 25 U.S.C. § 177.

"[N]o *sale*, grant, lease of any character or other conveyance of lands, or any title or claim thereto, *made by any Pueblo as a community or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico* shall be of any validity in law or in equity unless the same be *first approved by the Secretary of the Interior.*" Pueblo Lands Act § 17.

The parallel is obvious. "*Sale*" is used in Section 17 instead of "*purchase*" because "purchase" was specially defined for purposes of the Pueblo Land Act by Section 11 of the Act (Pet. App. 33) to refer to purchases by the Pueblos. That change required in turn that "*from* any Indian nation . . ." in the Non-Intercourse Act be changed to "*by* any Pueblo . . ." in Section 17. When "first approved by the Secretary of the Interior" in Section 17 is recognized as the equivalent of "made by treaty or convention entered into pursuant to the Constitution" in the Non-Intercourse Act, *i.e.*, as the necessary condition for making conveyances under either statute valid in law or equity, the parallel between the Non-Intercourse Act and the second clause of Section 17 of the Pueblo Lands Act is seen to be complete.

It follows from this textual incorporation of the Non-Intercourse Act in the second provision of Section 17 that Congress meant the second clause as its expression of the policy of the Non-Intercourse Act in application to the Pueblos. The first sentence, on the other hand, says nothing on the subject of the Non-Intercourse Act, namely purchases (or, looked at from the

other direction, sales), grants, leases, and other conveyances of land. It speaks of interests being acquired or initiated under New Mexico law—an obvious reference, as we have seen, to gaining interests in Pueblo land against the Pueblos' wishes or without their consent.

Moreover, the Section 17 requirement of approval of the Secretary of the Interior—or, in some earlier versions, the President—is a commonplace in statutes[23] and treaties[24] that

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[23] *E.g.*, 25 U.S.C. § 397 (originally enacted as Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 795) (5 year leases for grazing or 10 year leases for mining purposes by tribal council with Secretary's approval); 25 U.S.C. § 415, 416 (originally enacted as Act of Aug. 9, 1955, ch. 615, § 1, 69 Stat. 539) (leases of restricted Indian lands for various purposes by owner with Secretary's approval); 25 U.S.C. § 409 (originally enacted as Act of June 21, 1906, ch. 3504, 34 Stat. 327) (sales and conveyances of allotted lands within reclamation projects by Indians under rules prescribed by Secretary); 25 U.S.C. § 396 (Act of Mar.3, 1909, ch. 263, 35 Stat. 783) (leases of allotted lands for mining purposes by allottee for term and under rules prescribed by Secretary); 25 U.S.C. § 393a (Act of Feb. 11, 1936, ch. 50, 49 Stat. 1135) (5 year leases for farming and grazing purposes of restricted lands of Five Civilized Tribes of Oklahoma by owner with approval of Five Civilized Tribe Agency official only under rules prescribed by Secretary); 25 U.S.C. § 393 (Act of March 3, 1921, ch. 119, § 1, 41 Stat. 1232) (lease of restricted allotment of any Indian for farming and grazing purposes by allottee or heirs with consent of reservation official and under rules prescribed by Secretary); 25 U.S.C. § 392 (Act of Sept. 21, 1922, c. 367, § 6, 42 Stat. 995) (any form of conveyance of lands allotted under law or treaty that forbids alienation without approval of President of United States may be approved by Secretary); 25 U.S.C. § 403 (Act of June 25, 1910, ch. 431, § 4, 36 Stat. 856) (Indian allotment held under trust patent may be leased by allottee for 5 years under rules prescribed by Secretary); 25 U.S.C. § 406 (Act of June 25, 1910, ch. 431, § 8, 36 Stat. 857) (timber on Indian lands held under trust may be sold by owner with consent of Secretary); 25 U.S.C. § 407 (Act of June 25, 1910, ch. 431, § 7, 36 Stat. 857) (sales of timber or unallotted lands under regulations prescribed by Secretary); Act of July 2, 1945, 59 Stat. 313 (conveyances by members of Five Civilized Tribes valid after enactment date with consent of Secretary); Act of Feb. 27, 1925, § 3, 43 Stat. 1008 (trust lands of Osage Indians may be sold by legal guardians with consent of Secretary).

[24] *E.g.*, Treaty with the Delawares, Oct.3, 1818, 7 Stat. 188, C. Kappler, Indian Affairs Laws and Treaties (hereinafter cited as "I.A.L.T.") Vol. II p. 171 (grants to specific individuals not to be conveyed without consent of President); Treaty with the Chickasaw, May 24, 1834, 7 Stat. 450, I.A.L.T. Vol. II pp. 418-19 (reservation lands may be sold, leased, or disposed of upon consent of two tribal agents and President); Treaty with the Potawatomi, Oct. 2, 1818, I.A.L.T. Vol. II p. 168 (grants to specific individuals not to be conveyed without consent of President); Treaty with the Cherokee, July 19, 1866, 14 Stat. 799, I.A.L.T. Vol. II p. 946 (lands granted for missionary or educational purposes not to be sold without consent of Cherokee national Council and Secretary); id., I.A.L.T. Vol. II p. 948 (any lands owned by Cherokees in Arkansas and in states east of the Mississippi may be sold by Cherokee Nation in manner prescribed by Cherokee national council and with consent of Secretary).

authorize the alienation of Indian land. In adapting the terms of the Non-Intercourse Act to "accord with the conditions of the Pueblo Indians," Congress was breaking no new ground but acting squarely in the tradition of federal Indian law.

In *Pickering* v. *Lomax*, 145 U.S. 310 (1892), this Court held valid a deed granted pursuant to a treaty provision nearly identical to the second clause of Section 17. The treaty provided:

> "The tracts of land herein stipulated to be granted, shall never be leased or conveyed by the grantees, or their heirs, to any persons whatever, without the permission of the President of the United States." 145 U.S. at 311.

The Court said:

> "The object of the provision was not to prevent the alienation of lands *in toto*, but to protect the Indian against the improvident disposition of his property, and it will be presumed that the President, before affixing his approval, satisfy himself that no fraud or imposition had been practiced upon the Indian when the deed was originally obtained." 145 U.S. at 316; *see also Lomax* v. *Pickering*, 173 U.S. 26 (1899); *Smith* v. *Stevens*, 10 Wall. 321 (1870).

The court below invoked a canon that statutes passed for the benefit of Indians "are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976). (J.A. 104.) The principle is unexceptionable. But here, if there were doubt about Congress' expression—as there should not be—the resolution of the doubt that would favor the proud Pueblo communities, accustomed to managing their own affairs, is the construction of the statute that both they and their guardians from the Bureau of Indian Affairs adopted and acted upon soon after the statute was enacted. That construction allows a Pueblo's governors to continue to make conveyances of the Pueblo lands subject only to the approval of the Cabinet officer responsible for their welfare. It does not stultify them by preventing them from engaging in any land transactions at all without a full exertion of the national legislative power by House, Senate, and President. In any event, the principle of construction stated by the court of appeals does not permit a court to ignore the clear wording of a treaty, agreement, or enactment or to disregard the intent of Congress. *Rice* v. *Rehner*, 103 S.Ct. 3291, 3302 (1983).

Furthermore, another governing principle, ignored below, is that Indian statutes "must be read in light of common notions of the day and the assumptions of those who drafted them." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). So read, Section 17 is clear in its meaning.

D. Even if There Were More Doubt than There Is About the Meaning of Section 17, Deference Would Have to Be Given to the Consistent Administrative Construction that It Authorizes Voluntary Conveyances by the Pueblos with the Approval of the Secretary of the Interior.

Last term this Court reminded the courts of appeals and district courts, as it often has in recent years, that they are not to disregard the consistent construction by an agency of a

statute it administers merely because a court would construe the statute differently if the question were posed to it in the first instance. *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984). The Court said that, of course, "[i]f the intent of Congress is clear, that is the end of the matter . . . ." *Id.* at 2782. But, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 2782. Or, as the Court has put it on other occasions, when a statute is ambiguous, the question is whether the agency has adopted a "sufficiently reasonable" construction.[25]

In this case the court below did not question the proposition that the Interior Department has consistently construed Section 17, from very soon after it was enacted, as permitting the New Mexico Pueblos to make volitional conveyances of interests in their lands if the Secretary of the Interior approves. The court could not rationally question the fact of the agency construction. Sixty instances of approvals by the Secretary of rights-of-way and other interests in Pueblo lands were adduced from the records of one Pueblo agency; nine of these involved the Pueblo of Santa Ana itself. (Pp. 7–8 *supra*.) Santa Ana has attempted to minimize the significance of these instances of agency action on the ground that they are heavily (though not exclusively) concentrated in the early years after the statute was enacted. But that is no ground for minimization. On the contrary, an agency interpretation adopted close to the time of enactment is most likely to reflect the true congressional intent. That Section 17 came to be invoked less often as time

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[25] FEC v. Democratic Senatorial Campaign Committee, 454 U.S 27, 39 (1981); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); Udall v. Tallman, 380 U.S. 1, 18 (1965); *see also* E.I. Du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 54-55 (1977); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 121-22 (1973); Zemel v. Rusk, 381 U.S. 1, 11 (1965); La Roque v. United States, 239 U.S. 62, 64 (1915).

passed is solely attributable to the fact that, beginning in 1926, statutes providing other means of obtaining rights-of-way across Pueblo lands were enacted. (P. 37, *infra*.)

There is no doubt that the Department has consistently maintained its view of the meaning of the statute. Felix Cohen, writing with his own scholarly authority and under the Department's auspices, states flatly in his handbook that Section 17 "laid down an absolute rule that no . . . transfer [of land or interests in land by Pueblo authorities or individual Pueblo Indians] should be of any validity in the future unless approved in advance by the Secretary of the Interior," F. Cohen, *Handbook of Federal Indian Law* 390 (1942), and that "section 17 of the Pueblo Lands Act . . . bars transfer of pueblo land not approved in advance by the Secretary of the Interior," *id.* at 392. *See also id.* at 104 & n.195, 327, 395-96. None of Cohen's cited references to Section 17 suggests that the statute's first clause is applicable to consensual transfers of interests in land, or that consensual transfers are forbidden even if the Secretary has approved them. *See also* United States Department of the Interior, *Federal Indian Law* 692 n.28 (1958); *The Legal Status of the Indian Pueblos of New Mexico and Arizona*, 57 I.D. 36, 49 (1939).

The court of appeals denied the consistent administrative construction its proper deference on the sole ground that Section 17 is unambiguous and the Interior Department's construction violates "the plain congressional intent" of the section. (J.A. 105.) For all the reasons stated in preceding sections of this Brief, the words of the statute plainly bear the Interior Department's construction and perhaps compel it. At the very worst, Section 17 is ambiguous. The court of appeals therefore had no justification for ignoring the administrative construction.

The Pueblo has attempted to suggest that the Department's construction of Section 17 was a contrivance, master-minded by a Chicago bond lawyer and designed solely to benefit a small

railroad that was ailing and might be doomed if it lost its Pueblo rights-of-way. (Br. in Opp. 9-10.) The letter to the Attorney General from Mr. Fraser, the Justice Department attorney who was on hand in New Mexico to protect the interest of the Pueblos, which the Pueblo has offered to show that the agency construction was such a contrivance, shows no such thing. We have quoted from the letter at previous points in our argument (pp. 17, 20–21, *supra*). What the letter (pp. 1a–5a, *infra*) shows is responsible people, including the special counsel to the Pueblos, working out a problem with the help of a recently enacted statute with whose background they were intimately familiar—precisely the kind of circumstance that this Court has said gives particular weight to an agency interpretation adopted when a statute is new on the books. *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 409-10 (1975); *Udall* v. *Tallman*, 380 U.S. 1, 18 (1965); *Power Reactor Development Co.* v. *International Union of Electrical Radio & Machine Workers*, 367 U.S. 396, 408 (1961); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933).

The incident of the small railroad and its rights-of-way described in the Fraser letter also points up sharply the difference between the first and second clauses of Section 17 and the governmental undertaking to harmonize its two clauses, which at first reading appear "contradictory" (p. 17, *supra*).[26] In July 1924, a month after the passage of the Pueblo Lands Act, the Secretary of the Interior purported to grant a right-of-way to a railroad across Pueblo lands under the general right-of-way statutes then in effect, which did not require Pueblo consent to the grant. 30 Stat. 990, 25 U.S.C. §§ 312-18. In 1925, the

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[26] The following paragraphs are based on the Fraser letter and on hearings and reports on 1976 legislation, 90 Stat. 1275, that repealed the 1926 condemnation statute mentioned in the text. *Hearings on S. 217 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 2-5 (1975); S. Rep. No. 94-148, 94th Cong., 1st Sess. 2-3 (1975); H.R. Rep. No. 94-800, 94th Cong., 2d Sess. 2-3 (1976).

Pueblo Lands Board informed the Secretary that, in its opinion, those right-of-way statutes did not apply to the Pueblos. Thereafter, representatives of the Department of the Interior, the Pueblos, and those seeking rights-of-way across Pueblo lands met in Chicago. Mr. Fraser wrote after the meeting:

> "It was the general sense of all present that while the Pueblos should be protected in every way, their peculiar status ought not to put them in a more favored position than other Indians . . . so as to be able to prevent railways, telegraph and telephone and power lines, etc. from crossing their grants." (Pp. 2a–3a, *infra*.)

Section 17 suggested itself as a way of validating the railroad's rights-of-way. According to Mr. Fraser Section 17 presented "one of the numerous puzzles offered by the Act." But, as we have seen (p. 21, *supra*), he concluded that to construe Section 17 to allow voluntary conveyances of rights-of-way by the Pueblos with the approval of the Secretary of the Interior was "reasonable."[27]

Thereafter, the Pueblos of Santa Ana and Zia executed right-of-way deeds to the railroad that were approved by the Secretary. But the Pueblo of Jemez did not, apparently because the railroad's right-of-way bordered some of the Pueblo's sacred springs. Jemez was of course under no obligation to convey the right-of-way under the second clause of Section 17. The Secretary had no authority to convey a right-of-way on his own. An involuntary transfer could be had under the first clause of Section 17 only if Congress took further action. Rather than authorize the Secretary to grant the right-of-way, Congress in 1926 passed legislation authorizing the condemnation of rights-of-way over Pueblo lands. 44 Stat. 498. *See* H.R. Rep. No. 955, 69th Cong., 1st Sess. (1926).

[27] Mr. Fraser came to assert this "reasonable" construction of § 17 quite positively as the correct construction. On January 4, 1927, Mr. Fraser wrote to Mountain Bell attorneys and inquired about their intentions regarding a right-of-way across the lands of the Pueblo of Taos. In that letter, Mr. Fraser referred to the condemnation legislation enacted in 1926 (p. 37, *infra*) and concluded by stating, "The Pueblo Lands Act of June 7, 1924 . . . also provides in section 17 a method whereby titles may be procured from the Pueblo Indians with the assent of the Secretary of the Interior. In my judgment these are the only two ways whereby a good title can now be obtained." (The Fraser letter of January 4, 1927, was appended to petitioner's brief in reply to the brief in opposition and has been reproduced in the appendix to this Brief (pp. 6a-7a, *infra*) for the Court's convenience.)

The railroad then brought a condemnation suit against the Pueblo of Jemez, but a court held that the United States was a necessary party and had not consented to be sued so that relief could not be had.[28] To remedy the situation, Congress in 1928 passed the Act of April 21, 1928, 45 Stat. 442, now 25 U.S.C. § 233. The 1928 Act for the first time extended to the lands of the New Mexico Pueblos the provisions of general Indian land right-of-way authorization statutes, which at that time allowed the Secretary of the Interior to make grants of rights-of-way without the consent of the affected Indian community. *See* H.R. Rep. No. 816, 70th Cong., 1st Sess. (1928); S. Rep. No. 799, 70th Cong., 1st Sess. (1928).

The Department of the Interior nevertheless continued to act under Section 17, approving consensual grants of rights-of-way by the Pueblos after 1928, even though, between 1928 and 1948, the Secretary of the Interior could grant a right-of-way on his own authority.[29] This long-standing and unwavering

[28] *See* Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo of Laguna, 542 F.2d 1375, 1377 (10th Cir. 1976).

[29] The Department of the Interior did not employ this procedure only in the case of the Pueblos but viewed it as a means of granting rights-of-way across lands of any tribe. In introducing legislation that became the 1948 General Purpose Rights-of-Way Act, now 25 U.S.C. §§ 323-328, which required tribal consent, the Under Secretary of the Interior wrote to the President pro tempore of the Senate:

> "When it is discovered that an application for a right-of-way may not be granted under existing statutory authority, which is often

adherence by the Interior Department, the agency charged with the administration of the Pueblo Lands Act, to the construction of Section 17 that was agreed on in 1926 is entitled to great deference. *United States* v. *Clark*, 454 U.S. 555, 565 (1982); *see also Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 42 n.27 (1977). The court below ignored the fact that agency officials carrying out statutory commands have a better view of the statutory mandate than a reviewing court many years later—especially when, as here, the agency officials participated in the legislative process and when the first judicial decision comes 60 years after the statute was enacted. *See Power Reactor Development Co.* v. *International Union of Electrical Radio & Machine Workers*, 367 U.S. 396, 408 (1961); *see also United States* v. *Vogel Fertilizer Co.*, 445 U.S. 16, 31 (1982).

The passage of 60 years adds weight to the demand for deference to the agency practice in another way in this case. We deal here with land titles. Mountain Bell and other grantees of rights-of-way across Pueblo lands have relied on the agency construction in making use of their rights-of-way. Investments have been made on the strength of the agency's construction. The stability of the land titles that underlie the investments is in itself an important consideration. *See Minnesota Co.* v. *National Co.*, 3 Wall. 332, 334 (1865); *United States* v. *Title Insurance & Trust Co.*, 265 U.S. 472, 486-87 (1924); *see also Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-58 (1978); *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921).

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the case, the right must then be obtained by means of easement deeds executed by the Indian owners and approved by the Secretary of the Interior." S. Rep. No. 823, 80th Cong., 2d Sess. 3-4 (1948).

Thus, the administrative practice in the case of the Pueblos was comparable to that applicable to other tribes.

II. THIS SUIT IS BARRED BY A PRIOR ADJUDICATION OF MOUNTAIN BELL'S TITLE TO THE DISPUTED RIGHT-OF-WAY IN A SUIT BETWEEN THE SAME PARTIES.

The Pueblo of Santa Ana's claim in this case is that Mountain Bell has no title to the right-of-way in dispute and that its use of the right-of-way therefore is and has been since 1905 a continuing trespass. The same claim against Mountain Bell was stated in the quiet title suit brought by the United States on behalf of the Pueblo in 1927. *United States of America as Guardian of the Pueblo of Santa Ana* v. *Brown*, No. 1814 Equity (D.N.M.). Like the present suit, the *Brown* complaint both alleged that Mountain Bell lacked title to the right-of-way and sought on that ground to enjoin further use of the right-of-way as a continuing trespass. (J.A. 29, 33.) The district court dismissed that claim as to Mountain Bell on the ground that Mountain Bell had acquired a new and valid title to the right-of-way in its agreement of February 23, 1928, with the Pueblo. (J.A. 37.)

The decree of dismissal in *Brown* is a complete bar to the Pueblo's complaint in this case for the years that have passed since it was entered on May 31, 1928. As to those years the present complaint is an attempt to assert, in a suit between the same parties, the very claim of Pueblo title that was rejected when the court in *Brown* dismissed Mountain Bell as a defendant on the ground that its competing claim of title was good.[30]

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[30] The fact that in *Brown* the Pueblo was represented by the United States does not alter the res judicata effect of the decree on subsequent litigation brought by the Pueblo in its own name. In Nevada v. United States, 103 S.Ct. 2906, 2921 (1983), this Court held that res judicata applies when an Indian

Under well-settled law, a prior final judgment on the same claim between the same parties is res judicata and cannot be relitigated in a later suit. *Nevada* v. *United States*, 103 S.Ct. 2906, 2918 (1983).

A. The Court Below Erred in Holding that the Brown Decree Was Not Final.

The court of appeals held that the *Brown* order of dismissal was not a final judgment, and therefore was not entitled to res judicata effect, because the decree "failed to state whether it was with or without prejudice, and it was, therefore without prejudice." (J.A. 105-06.)[31] That holding is in error. Under the equity rule that prevailed in 1928, such a decree was a dismissal with prejudice.

1. *In 1928 the Dismissal of a Bill in Equity Was Presumed to Be on the Merits, and with Prejudice, Unless Otherwise Stated.*

The court below relied on the presumption of Rule 41(a), Fed. R. Civ. P., that a dismissal is without prejudice unless otherwise stated. Although the Federal Rules were not in force at the time of the *Brown* decree, the court of appeals believed that Rule 41(a) reflected "long established practice in federal courts," citing a dictum in *Home Owners' Loan Corp.* v. *Huffman*, 134 F.2d 314, 317 (8th Cir. 1943). (J.A. 106.)[32]

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tribe has been represented in a prior action by the United States, without regard to whether the tribe was a party or had an opportunity to intervene.

[31] The court also concluded that the decree could not be viewed as a consent decree (to which no such presumption that it was without prejudice would attach) on the ground that it "indicates neither the court's consideration nor approval of the agreement." (J.A. 106.)

[32] The Federal Rules of Civil Procedure took effect on September 1, 1938. Fed. R. Civ. P. 86. Prior to their adoption, the Conformity Act of June 1, 1872, c. 255, § 5, 17 Stat. 197, repealed by the Act of June 25, 1948, c. 646, § 39, 62 Stat. 992, required the federal courts in actions at law to apply the nonsuit rule of the state in which they sat. Barrett v. Virginian Ry., 250 U.S. 473,

In fact, however, the *Huffman* dictum relied on by the court below was not addressed to the Rule's presumption as to the effect of a dismissal. It referred to the prior practice governing the circumstances in which a voluntary dismissal was permitted. In federal equity courts, the general rule was just the reverse of the Rule 41(a) presumption. A general dismissal in equity was presumed to be *with* prejudice unless the decree expressly stated otherwise:

> "A general decree of dismissal of a suit in equity, without more, renders all the issues in the case *res judicata*, and constitutes a bar to an action at law for the same cause. Hence, when a court of equity has no jurisdiction of a suit, the decree of dismissal must expressly adjudge that it is rendered for that reason, or must expressly provide that it is made without prejudice, to the end that the complainant may resort to his action at law . . . ." *Indian Land & Trust Co.* v. *Shoenfelt*, 135 F. 484, 487 (8th Cir. 1905).

As Justice Field wrote for this Court in *Durant* v. *Essex Co.*, 7 Wall. 107 (1868):

> "The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. *Where words of qualification, such as "without preju-*

475-76 (1919). In equity cases, however, the federal courts were free to adopt their own procedures, drawing "just analogies" from English chancery practice. Lindley v. Denver, 259 F. 83, 85 (6th Cir. 1919); Individual Drinking Cup Co. v. Union News Co., 250 F. 625, 626 (2d Cir. 1918). Rule 41, which superseded the widely varying practices in the different states and established a uniform practice, was not retroactive. 2B W. Barron & A. Holtzoff, *Federal Practice and Procedure* § 915, at 128 (1961 ed.).

> *dice," or other terms indicating a right or privilege to take further legal proceedings on the same subject, do not accompany the decree, it is presumed to be rendered on the merits." Id.* at 109 (emphasis added).[33]

Brown was a suit in equity. The decree dismissing Mountain Bell as a defendant in the *Brown* suit makes no recital that it is "without prejudice" and no suggestion that a "right or privilege to take further legal proceedings" is reserved. Under the prevailing equity rule, this was a dismissal with prejudice, and the decree was therefore a final judgment precluding any later litigation of the claim between the same parties.

2. The Dismissal Was with Prejudice for the Further Reason that It Was Expressly Based on a Resolution of the Underlying Dispute.

The *Brown* decree not only lacks any recital that it is based on a reason other than the merits; it affirmatively recites that the suit was being dismissed because Mountain Bell had "secured good and sufficient title to the right-of-way and premises in controversy" (J.A. 37), thus extinguishing the plaintiff's claim on the merits. Under this Court's decision in *United States* v. *Parker*, 120 U.S. 89 (1887), a dismissal thus predicated on a resolution of the subject matter of the suit is a dismissal with prejudice, even in an action at law.

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[33] *Accord*, Lyon v. Perin & Gaff Mfg. Co., 125 U.S. 698, 702 (1888); House v. Mullen, 22 Wall. 42, 46 (1874); Walden v. Bodley, 14 Pet. 156, 161 (1840); Scott v. First Nat'l Bank of Morris, 285 F. 832, 835 (8th Cir. 1922); Carlisle v. Smith, 224 F. 231, 234 (N.D. Ga. 1915), *decree rev'd on other grounds*, 228 F. 666 (5th Cir. 1916) ("If [the plaintiff] simply dismisses, without expressing in his order of dismissal that it is without prejudice, the case will be held to have been determined on the merits"). The same rule was applied in state courts. *E.g.*, Newton v. Kemper, 66 S.E. 102, 103 (W. Va. 1909); Stickney v. Goudy, 23 N.E. 1034, 1035 (Ill. 1890); Martin v. Evans, 36 A. 258, 259 (Md. App. 1897) (unqualified decree of dismissal "is presumed to be an adjudication on the merits adversely to the complainant, and constitutes a bar to further litigation of the same matters between the parties").

In *Parker*, the United States was held barred by res judicata from prosecuting a second action against a surety for reimbursement of monies not properly accounted for by a bonded public official. A prior action to collect on the same bond had been dismissed with the consent of the United States attorney upon presentation to the court of a statement of the official's accounts showing that the accounts in dispute "had been settled and adjusted" between the United States and the bonded official. The judgment of dismissal likewise recited "that the subject matter in this suit has been adjusted and settled by the proper parties in Washington . . . ." *Id.* at 91. The United States attempted to bring the second action against the surety after a subsequent audit disclosed that additional amounts were in fact unaccounted for.

On these facts, this Court squarely rejected the United States' claim that the dismissal of the first suit was only a nonsuit and therefore not a final judgment. The Court held on the contrary that the plaintiff's consent to the dismissal was "an open, voluntary renunciation of [plaintiff's] claim in court," by which the plaintiff "forever loses his action." *Id.* at 95, quoting 3 Blackstone's Commentaries 296. The Court said that a judgment reciting "that the subject matter of the suit had been adjusted and settled by the parties" is "equivalent to a judgment that the plaintiff had no cause of action, because the defense of the defendant was found to be sufficient in law and true in fact." *Id.* at 95-96. Therefore, the Court concluded:

> "It must be held that the judgment here in question was rendered upon the merits of the case, is final in its form and nature, and must have the effect of a bar to the present action upon the same cause." *Id.* at 96.

Although the motion to dismiss in *Parker* was made by the defendant rather than by the plaintiff, the decision turns on the consent of the plaintiff's attorney to the recital that the underlying accounts had been settled or adjusted—a consent that the Court holds is sufficient to constitute a voluntary renunciation

of the claim. It is therefore immaterial that the court's order of dismissal in *Brown* was on the motion of the plaintiff United States. The *Brown* order, like the order in *Parker*, was expressly based on undisputed evidence that the underlying dispute had been resolved by agreement between the parties. In *Brown*, the attorney for the United States not only consented to the recital that the title dispute was resolved by the 1928 right-of-way agreement but stated affirmatively in moving for the dismissal that, on the merits, Mountain Bell had acquired "good and sufficient title" to the disputed right-of-way. (J.A. 36.) This is a stronger and clearer renunciation of the plaintiff's claim than the Government made in *Parker*; it is plainly no mere discretionary voluntary dismissal of a plaintiff's suit with the thought of perhaps filing again at a more propitious time.

Thus, under *Parker*, the dismissal of Mountain Bell from the quiet title suit was a dismissal with prejudice, quite apart from the equity presumption based on the absence of any provision to the contrary. On this ground as well, the *Brown* decree is a bar to further litigation.

B. All the Circumstances Support Application of Res Judicata in this Case.

Even if the preclusive effect of the *Brown* decree of dismissal were not clear as a matter of law, the circumstances surrounding the dismissal would make it a bar to further litigation, over a half century later, of the claim it dismissed as resolved. The parties themselves obviously regarded the dismissal as the end of litigation. And the intent of Congress in the Pueblo Lands Act, the special importance of res judicata in land title cases, and the interests of reliance and fairness, all require that the dismissal should be treated as the end of litigation in this case.

Like the suit to adjudicate water rights reviewed by this Court in *Nevada* v. *United States*, the *Brown* suit was "no garden variety quiet title action." 103 S.Ct. at 2925. It was one of several suits that the United States was required by the Pueblo Lands Act to bring in order to resolve long festering title problems engendered by this Court's decision in *United*

States v. *Sandoval*, 231 U.S. 28 (1913). Both the Act itself and its legislative history make clear that the intent of the statute was to resolve these title problems once and for all. (Pp. 22–24, *supra*.)

As we have seen, the Act established a Pueblo Lands Board to investigate all non-Indian claims of settlers on Pueblo land, and to identify every claimant to lands for which the Indian title had not been extinguished. Pueblo Lands Act § 2. All such claimants were to be named as defendants in quiet title suits such as the *Brown* suit, where their claims would be adjudicated; and the defendants were authorized to raise in those suits a defense of adverse possession that was otherwise unavailable. §§ 1, 4. Suits resolved in favor of non-Indian claimants—whether on the ground of adverse possession "*or upon any other ground*"—were to have "the effect of a deed or quitclaim as against the United States and said Indians . . . ." § 5 (Pet. App. 28) (emphasis added).

Thus, by the express terms of the statute, every decree favoring a claimant such as Mountain Bell was intended to be final—to have all the dignity of a title deed. Moreover, the legislative history confirms that Congress intended the Act as a whole, and the quiet title suits in particular, to result in a comprehensive final settlement of the outstanding claims.[34] It

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[34] *See, e.g.*, S. Rep. No. 492, 68th Cong., 1st Sess. 3 (1924) ("This bill is an effort to provide for the final adjudication and settlement of a very complicated and difficult series of conflicting titles affecting lands claimed by the Pueblo Indians of New Mexico"); 65 Cong. Rec. 8442 (1924) (Sen. Bursum) (*Sandoval* made it necessary "to have some kind of legislation which would settle and adjudicate the controversy on the basis of equity and right and giving to each that to which he was entitled"); *id.* (Sen. Adams) ("this is an effort to provide a method of adjudication and to establish titles. It resembles in a way the water-adjudication statutes with which the Senator from Arizona is familiar"). Several reports on bills preceding S. 2932, which became the Act, and the report on S. 2932 itself, recited the purpose of the legislation in identical terms: "To settle the complicated questions of title and to secure for the Indians all of the lands to which they are entitled is the purpose of this bill." S. Rep. No. 492, n. 15 *supra*, at 3; S. Rep. No. 1175, 67th Cong., 4th

is inconsistent with both the terms of the Act and its purpose to deny preclusive effect to the dismissal of a quiet title suit brought under the Act, in the absence of the clearest indication that the dismissal was intended to be without prejudice.[35]

Applying res judicata, based on the *Brown* decree, to bar the present action is also particularly appropriate because of the peculiar force of the policies underlying that doctrine as applied to judgments involving title to real property. As this Court emphasized only last year, "the policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water." *Nevada* v. *United States*, *supra*, 103 S.Ct. at 2918 n.10. And the Court has long recognized the special need for certainty and predictability where land titles are concerned. *See, e.g., Leo Sheep Co.* v. *United States*, 440 U.S. 668, 687 (1979); *Minnesota Co.* v. *National Co.*, 3 Wall. 332, 334 (1865); *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486-87 (1924). This need is at its most acute in a quiet title suit, the whole purpose of which is to obtain a declaration of title on which the owner and his successors can rely for ever after, avoiding the possibility that, if questions are later raised, witnesses may be dead and gone and documentary evidence may be incomplete and unreliable. In such a case, every presumption ought to be indulged in favor of finality.

Moreover, it is inequitable to allow relitigation of the *Brown* case at this late date. Upon its dismissal from the special statutory quiet title suit, Mountain Bell had every reason to

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Sess. 3 (1923) (S. 3855); H.R. Rep. No. 1748, 67th Cong., 4th Sess. 3 (1923) (S. 3855); H.R. Rep. No. 1730, 67th Cong., 4th Sess. 6 (1923) (H.R. 13452).

[35] In addition, the voluntary dismissal of Mountain Bell in *Brown* was consistent with the congressional expectation that many clouded titles could be cleared simply by disclaimers and consent decrees. 1923 Senate Hearings 102 (Senator Jones) ("perhaps 90 percent of these adverse claims can be recognized without litigation"); *id.* at 242 (Senator Wilson) ("there should be a pro forma adjudication of uncontested titles").

believe that the title question was finally resolved, just as it would have been had Mountain Bell remained in the case and proved the validity of its claim. It relied on the decree for over 50 years, forgoing both the opportunity to prove its case and other means of establishing or acquiring good title, such as condemnation or a right-of-way grant from the Secretary of the Interior, that may no longer be available and that in any event would have protected it against continuing liability for a trespass it had no reason to believe it was committing. To allow reopening of the title issue over a half century later, when early records are gone, defenses have been lost, and alternative remedies removed, is manifestly unfair.

For all these reasons, were there any doubt as to the preclusive effect of the *Brown* decree under the prevailing rules of equity, the doubt should be resolved in favor of applying res judicata. This is a case that fairly cries out for repose and an end to litigation.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court with instructions to grant Mountain Bell's motion for partial summary judgment, thereby validating its right-of-way for telephone poles across the Pueblo of Santa Ana's El Ranchito tract beginning in 1928.

Respectfully submitted,

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November 1984

APPENDIX

Appendix 1

Santa Fe, N.M.
February 27, 1926
c/o Pueblo Lands Board

United States as guardian of the Pueblo of Jemez, v. Santa Fe Northwestern Ry. Co.

The Attorney General,

Washington, D.C.

Sir:

This is one of the suits to quiet title following the report of the Pueblo Lands Board. It is at issue and could be tried at any time when a Federal Judge is available. There has recently occurred a new development, however.

This railroad was started as a private logging railroad, but has more or less developed until it is now about 40 miles long and has been recognized as a common carrier by the Interstate Commerce Commission. A further extension of 20 miles is being arranged, and it is locally hoped and expected that still further extensions will be made and that the road will be a valuable agency in developing the state.

Its right-of-way crosses not only Jemez but three other Pueblos, and was obtained in each case under the 1899 Act: U.S. Compiled Statutes, Section 4181, et. seq. The Pueblo Lands Board concluded that this Act was not broad enough to cover lands owned in fee by the Pueblo Indians and reported that the title to the land occupied by the Railway remained unextinguished in the Indians, subject to the easement of right-of-way, if any valid easement had been actually acquired. I agreed with the Board in believing that the Act of 1899 did not cover in this case. For this reason, and under the express requirements of the Pueblo Lands Act, a suit to quiet title became inevitable. You will find a discussion, both

of the facts and law, in my letters of November 4th and November 27, 1925, to you.

It now transpires that at the time the suit was filed, viz: about January 8, 1926, the White Pine Lumber Company, which is practically identical with the Railway Company, was negotiating a loan of over a million dollars to be secured by a bond issue covering properties, as I understand it, both of the Lumber Company and of the Railway Company, the proceeds to be used for further development work. The suit evidently came as a great surprise to the Railway Company, which had apparently not studied the Act of 1899 carefully and which, having fully complied with all the requirements of the Department of the Interior, believed its title to be sound. The bond houses in Chicago, which were preparing to underwrite the bond issue, immediately took cognizance of the situation, and after some correspondence a conference was had here yesterday, at their request. There were present, Governor H. J. Hagerman, who represents the Secretary of the Interior on the Pueblo Lands Board; Mr. Cochrane, Special Attorney for the Pueblo Indians; Judge Hanna, of Albuquerque, who is attorney for some of the Indian Aid societies and, as well, for local companies desirous of obtaining rights of way for power lines across some of the Pueblos; Mr. Porter, Vice-President of the Railway Company; Judge Hawley, of Chicago, representing the bond houses; and myself. The results of a lengthy discussion may be briefly summarized thus:

1. The Railway and Bond house representatives could not offer any plausible defense to the suit. In other words, while they would not admit that the Act of 1899 was inapplicable, it was quite clear that they felt such to be the case.

2. It was the general sense of all present that while the Pueblos should be protected in every way, their peculiar status ought not to put them in a more favored position than other Indians or than white men, so as to be able to prevent

railways, telegraph and telephone and power lines, etc. from crossing their grants. It also seemed fairly clear that this Railway has been a benefit rather than a detriment to the Jemez pueblo, being of some value to the Indians for transportation, and affording employment to a number of them. As above stated, this enterprise is favorably regarded in New Mexico as an existing agency of development which promises to be increasingly valuable to the state.

3. It was therefore felt that the government should not interfere with the Railway or its projected loan further than duty absolutely required, and there was much discussion as to how the right-of-way could be legalized. One alternative is offered by Section 17 of the Pueblo Lands Act, reading:

> "Sec. 17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."

This section presents one of the numerous puzzles offered by the Act. At first reading the two halves of the section seem contradictory; the first saying that no title to the Pueblo Lands shall be acquired except under subsequent legislation by Congress, and the second half saying, in effect, that conveyance by Pueblos, or individuals thereof, may be valid if approved by the Secretary of the Interior. We concluded, however, that the two halves might be harmonized by construing the first to mean that no title could be adversely acquired except under subsequent acts of Congress, and the

second to mean that the Pueblos might voluntarily convey, and that such conveyance would be good if approved by the Secretary. Like so many other feature [sic] of this Act, the foregoing construction cannot be considered certain, but seems reasonable.

Since the conference, defendant's representatives have announced a purpose of immediately approaching the Secretary of the Interior in an attempt to agree upon a form of deed acceptable to him, which they will then try to have executed by the Pueblo authorities, and returned to Washington for approval. If all this succeeds, the bonding houses will apparently be willing to make the proposed loan.

In any effort to procure a conveyance from the Pueblo, the Company will doubtless be met with a demand for additional compensation. I have heretofore expressed a doubt whether the damages already paid are adequate, and if the general scheme is approved, the question of increased compensation will be looked into by the Special Attorney for the Pueblo Indians. You will note that Section 17 does not expressly say that Pueblo conveyances shall hereafter be valid if approved by the Secretary, but merely that they shall *not* be valid unless so approved. Theoretically, and in fact, the Pueblo Indians are incompetent to manage their own affairs, and I think it unfortunate if the Pueblo corporations—and still more the individual Indians—are now authorized to convey, even subject to an approval, which must usually be based on the recommendation of some local official who may or may not be fully informed and disinterested. However, in the present instance the railway is already constructed and cannot well be got rid of; it has paid a considerable sum (nearly $3,000 to Jemez Pueblo) as damages; it appears to be a public benefit; and if it deems this method of curing its title sufficient, and can bring it about, I think the general good would be served by acquiescing rather than by urging the doubts suggested by Sec. 17.

4. In the long run, I believe that the only certain way of rectifying the general situation is by Act of Congress. It is fair that the Pueblos should be subject to the acquisition of rights of way for public utilities of all sorts, just as other Indians are, on payment of just compensation. It was suggested at the conference that it would not be difficult to frame an Act making the provisions of U.S. Compiled Statutes, Section 4181, et. seq., applicable to the Pueblos; but defendant has apparently decided to try the other course first.

5. One result of all the foregoing is that the Railway Company would like the suit to lie dormant until they can make an attempt to validate their title by one or the other of the above methods. If either should succeed, the controversy would become moot and the suit could be dismissed. They are naturally reluctant to run the risk of a judgment declaring in effect that they are trespassers, and call attention to their good faith and to the prima facie validity of the permit of the Secretary under which they acted. They also promise immediate action in the way above indicated, and obviously they cannot hope otherwise to obtain their loan.

I therefore ask authority to suspend proceedings in this suit for a reasonable time, until we see what they can accomplish.

I understand that Governor Hagerman and Mr. Cochrane agree with my views as to the desirability of assisting rather than thwarting the railway project, and that the former will so report to the Department of the Interior.

Respectfully,
s/GEO A. H. FRASER
Special Assistant to
the Attorney General

Appendix 2

DEPARTMENT OF JUSTICE
Santa Fe, N.M., Jan. 4, 1927.
c/o Pueblo Lands Board.

Messrs. Smith & Brock, Att'ys,
for the Mountain States Tel. & Tel. Co.,
Denver, Colorado

In re: Telephone lines on the Pueblo of Taos
Pueblo of Taos,
Taos County, New Mexico.

Dear Sirs:

In my capacity as attorney for the United States with instructions to bring suit to quiet title to effectuate the decisions of the Pueblo Lands Board on Pueblo titles in New Mexico, I write to inquire the facts with regard to your two telephone lines crossing the Pueblo of Taos. My information, which is very meagre, is to the effect that your main line now enters the Pueblo grant from the south, and after proceeding northerly for some distance, thence progresses in an easterly and westerly direction across the main grant and also across the Tenorio tract, which also belongs to the Pueblo. Further, I understand that you own, or operate, an earlier line, originally constructed by, or for, Dr. Thomas Martin, of Taos, the exact location of which I do not know.

The Board probably sometime during the present month will file its report on this Pueblo determining which titles of settlers or other intruders on the grant are valid and which invalid. Among these titles will be yours to these two telephone lines. I have heard that you took some steps to legitimate your title to the new main line, but cannot learn here exactly what you did. A somewhat similar situation arose on the Pueblo of Jemez with regard to a railway there which supposed that it had acquired a satisfactory title under the Act of March 2, 1899, 30 Stat. 990, as amended, 36 Stat. 859, U.S. Compiled Statutes,

Sec. 4181, et seq. I made up my mind that no title could be obtained to any portion of the Pueblo Indian grants under these statutes, and was therefore forced to bring suit to quiet title against this railway. One result of this was that in 1926 a statute was passed permitting the condemnation of Pueblo Indian lands in New Mexico. The Pueblo Lands Act of June 7, 1924, 43 Stat. 331, also provides in section 17 a method whereby titles may be procured from the Pueblo Indians with the assent of the Secretary of the Interior. In my judgment these are the only two ways whereby a good title can now be obtained.

I have, of course, no hostile feeling towards your Company, but it is necessary that this question of title shall be cleared up, and with that end in view I would be greatly obliged if you would let me know exactly what the present status of your right is to the two lines above mentioned and any other telephone line, if such there is, on the Taos Pueblo grant.

Please address me "c/o Pueblo Lands Board, Santa Fe, New Mexico."

With kindest personal regards, I am.

Very sincerely yours,
/s/ GEORGE A. H. FRASER
Special Assistant to
the Attorney General

GAHF-S